

May 30, 2019

***Via Certified U.S. Mail  
and Electronic Mail***

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**Sixty-Day Notice of Intent to Sue for Violations of the  
Endangered Species Act in Connection with Ongoing Operation  
and Management of the St. Lucie Nuclear Power Plant**

Dear Secretary Ross, Mr. Oliver, Mr. Sillagy, and Chairman Svinicki:

This letter serves as notice by Turtle Island Restoration Network and Beyond Nuclear of their intent to sue the Nuclear Regulatory Commission (“NRC”), the National Marine Fisheries Service (“Fisheries Service”), and Florida Power and Light (“FPL”) (collectively “Defendants” ) for violations of Sections 7 and Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. The violations alleged herein are based on actions and inactions related to the management and regulation of the FPL’s St. Lucie Nuclear Power Plant (“SNLPP” or “St. Lucie”) that have resulted

in and continue to result in the illegal take of, and other harms to, protected species, including the smalltooth sawfish (*Pristis pectinata*), Kemp's Ridley sea turtles (*Lepidochelys kempii*), and green sea turtles (*Chelonia mydas*), and for failing to reinitiate consultation in order to protect these listed species under Section 7 of the ESA, 16 U.S.C. 1536. Defendants' violations deprive these imperiled species of important protections and put them at further risk of extinction. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g).

As discussed below, Defendants have violated and continue to violate their legal duties under the ESA to protect and conserve threatened and endangered species. The Fisheries Service's and NRC's collective failure to ensure that adequate protective measures are adopted and implemented at the SNLPP has jeopardized two endangered species of turtle and the critically endangered smalltooth sawfish. FPL's ongoing operation of the St. Lucie facility has resulted in incidental take exceedances, without authorization, for these three endangered species in violation of the ESA.

## BACKGROUND

### I. Agency Activity Regarding the St. Lucie Nuclear Power Plant's Incidental Take of Endangered Species

On March 24, 2016, the Fisheries Service issued a biological opinion ("BiOp") for the continued operation of the St. Lucie facility that exempts from the prohibitions of ESA Section 9 the incidental take of smalltooth sawfish and five species of sea turtles, subject to compliance with the reasonable and prudent measures and terms and conditions of the incidental take statement. Importantly, these non-discretionary reasonable and prudent measures require that the facility:

1. *Avoid and Minimize Entrainment into the SLNPP Intake Canal.* In particular, NRC "must ensure FPL designs, test, constructs, and implements an excluder device that reduces the number of turtles and smalltooth sawfish that enter the SLNPP intake canal."<sup>1</sup>
2. *Avoid and Minimize Injurious or Lethal Take.* In particular, NRC must ensure that FPL monitors, inspects, and maintains its intake system.<sup>2</sup>

The terms and conditions of the BiOp implement these measures by imposing a continuing duty on NRC to, among other things, ensure that "FPL designs, tests, constructs, and implements excluder devices for the intake pipe velocity caps at SLNPP. FPL must consult with [the Fisheries Service] and the NRC on the designs and test results. Within 60 days of receipt of all excluder device design and test information and clarifying discussions, [the Fisheries Service] must agree to the design

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<sup>1</sup> BiOp at 65.

<sup>2</sup> Id.

for the structure before installation at the velocity caps.”<sup>3</sup> Despite this strict requirement, it has now been more than *five months* since the Fisheries Service and NRC received the relevant excluder device design and test information, but no follow-on action has occurred. Instead, it appears from available public documents that NRC terminated consultation last December and neither NRC nor FPL propose or contemplate any corrective action.

Meanwhile, FPL continues to exceed its incidental take permit. In November 2017, as the holder of the NRC renewed facility operating license for St. Lucie, FPL notified NRC that the facility had exceeded the permit capture limit for the smalltooth sawfish. Subsequently, in January 2018, FPL notified NRC that the capture limit for Kemp’s ridley sea turtles also had been exceeded. In May of 2018, FPL exceeded its take limit for green sea turtles. And FPL has now exceeded its take limit for Kemp’s ridley sea turtles for 2019, as well.

The Fisheries Service and the U.S. Fish and Wildlife Service’s joint regulations at Title 50 of the Code of Federal Regulations require reinitiation of formal consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and “the amount or extent of taking specified in the incidental take statement is exceeded.”<sup>4</sup> Thus, because NRC retains discretionary licensing control over the St. Lucie facility and FPL has exceeded its incidental take allowances, consultation *must* be reinitiated.

NRC requested to reinitiate consultation by letter dated February 9, 2018. But on December 18, 2018, the Fisheries Service and NRC jointly elected to “close out” that consultation on the basis of insufficient information and agreed that NRC would reinitiate consultation once FLP produced a final version of its December 6, 2018 Test Evaluation Report for the Fixed Barrier for St. Lucie Power Plant Intake Velocity Caps.<sup>5</sup> Since the release of that report, however, consultation has not been reopened or reinitiated.

## **II. Species at Risk**

### **A. Smalltooth Sawfish**

The smalltooth sawfish was listed as “Critically Endangered” in 2006 because its global abundance declined at least 95 percent during the past three generations (i.e. since 1962). The species has likely been extirpated from large portions of its historic range, and the remaining populations are small and fragmented.<sup>6</sup> Based on anecdotal

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<sup>3</sup> BiOp at 66.

<sup>4</sup> 50 CFR § 402.16.

<sup>5</sup> See Memorandum from Briana Grange, NRC, to Audra Livergood, NOAA, re “Withdrawal of ESA Section 7 Consultation SER-18-19124 St. Lucie Plant” (Dec. 18, 2018).

<sup>6</sup> BiOp at 40.

data and the fact that the range has contracted by nearly 90%, with south and southwest Florida the only areas known to support a reproducing population, the U.S. population may number less than 5% of historic levels.<sup>7</sup>

### **B. Kemp's Ridley Sea Turtle**

The Kemp's ridley sea turtle was listed as endangered on December 2, 1970 under the Endangered Species Conservation Act and since 1973 has been listed as endangered under the ESA.<sup>8</sup> The Kemp's ridley is considered the most endangered sea turtle.<sup>9</sup> Of the seven extant species of sea turtles in the world, the Kemp's ridley has declined to the lowest population level.<sup>10</sup>

### **C. Green Sea Turtle**

The green sea turtle was federally listed under the ESA on July 28, 1978, with all populations listed as threatened except for the Florida and Pacific coast of Mexico breeding populations, which are endangered.<sup>11</sup> A conservative estimate of mature females nesting annually indicates a 48-67 percent decline over the last three generations, but the actual decline might exceed 70 percent.<sup>12</sup>

## **VIOLATIONS OF THE LAW**

### **I. The Endangered Species Act**

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species.”<sup>13</sup> Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”<sup>14</sup> The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>15</sup> Similarly, Section 7(a)(1) of the ESA directs that the Fisheries

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<sup>7</sup> Id.

<sup>8</sup> Id. at 25.

<sup>9</sup> Id.

<sup>10</sup> Id. at 26.

<sup>11</sup> Id. at 16.

<sup>12</sup> Id. at 17.

<sup>13</sup> 16 U.S.C. § 1531(b).

<sup>14</sup> 16 U.S.C. § 1531(c)(1).

<sup>15</sup> 16 U.S.C. § 1532(3).

Service and other federal agencies shall use their programs and authorities to conserve endangered and threatened species.<sup>16</sup>

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with the Fisheries Service to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical.”<sup>17</sup> This provision is both procedural and substantive. The action agency must assess the effects of its actions on endangered species where the species may be present. When an agency determines that its proposed action “may affect listed species or critical habitat” it must engage in formal consultation with the federal resource agency responsible for the species at issue.<sup>18</sup>

Consultation must be concluded within the 90-day period beginning on the date on which it is initiated or, under certain circumstances, another period.<sup>19</sup> If the period will end before the 150th day, the Fisheries Service must submit a written statement setting forth reasons why a longer period is required and an estimated date of completion.<sup>20</sup> If consultation will last longer than 150 days after initiation, the Fisheries Service must obtain consent to such a period from the agency requesting initiation.<sup>21</sup>

Meanwhile, the action agency also has an independent duty to comply with Section 7(a)(2)’s substantive requirement to ensure that its actions are not likely to jeopardize the continued existence of species or adverse modification of their habitat. This duty exists during consultation, and only terminates upon the conclusion of consultation when the Fisheries Service issues a biological opinion that determines whether the agency action is likely to jeopardize the species. If so, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.<sup>22</sup> The Fisheries Service may also “suggest modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy.<sup>23</sup>

An agency’s duty to avoid jeopardy is continuing, and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must in certain circumstances reinitiate formal consultation:

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<sup>16</sup> 16 U.S.C. § 1536(a)(1).

<sup>17</sup> 16 U.S.C. § 1536(a)(2) (Section 7 consultation).

<sup>18</sup> 50 C.F.R. § 402.14(a).

<sup>19</sup> 16 U.S.C. § 1536(b).

<sup>20</sup> 16 U.S.C. § 1536(b).

<sup>21</sup> 16 U.S.C. § 1536(b).

<sup>22</sup> 16 U.S.C. § 1536(b).

<sup>23</sup> 50 C.F.R. § 402.13.

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.<sup>24</sup>

If reinitiation of consultation is triggered, the action agency is once again responsible, under Section 7(a)(2), for ensuring that its actions are not likely to jeopardize protected species. Concurrent with that duty is Section 7(d)'s mandate that once a federal agency initiates or reinitiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of interagency consultation.

Compliance with the biological opinion protects federal agencies and others acting pursuant to its terms and conditions from enforcement action under Section 9's prohibition against take.<sup>25</sup> "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>26</sup> The Service has extended these protections to threatened species by protective regulations deemed necessary and advisable for the conservation of the threatened species, including sea turtles.<sup>27</sup> Section 7(o)(2) provides that "any taking that is in compliance with the terms and conditions specified in a written statement under subsection (b)(4)[sic](iv) of this section shall not be considered to be a prohibited taking of the species concerned." However, take not in compliance with the biological opinion is in violation of Section 9 of the ESA.

Based on available information and belief, Defendants are violating the ESA in the following ways:

1. NRC and FPL are in violation of Section 9 of the ESA for unlawful take of endangered and threatened species because:

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<sup>24</sup> 50 C.F.R. § 402.16.

<sup>25</sup> See 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31 (a).

<sup>26</sup> 16 U.S.C. § 1532(19).

<sup>27</sup> 16 U.S.C. § 1533(d); 50 C.F.R. § 17.42(b) (extending section 9 prohibitions to threatened sea turtles).

- a. FPL's St. Lucie facility has exceeded the take of smalltooth sawfish, Kemp's ridley sea turtles, and green sea turtles authorized in the incidental take statement in the 2016 BiOp; and
  - b. NRC and FPL are violating the terms and conditions of the BiOp.
2. The Fisheries Service and NRC are in ongoing violation of Section 7 of the ESA due to their failure to:
    - a. Ensure that their actions and inactions are not likely to jeopardize endangered and threatened species as required by Section 7(a)(2); and
    - b. Timely reinitiate and complete consultation upon exceedance of the take limits in the 2016 BiOp.

## **II. Violations of ESA Section 9**

Based on information and belief, NRC is continuing to allow the operation of the St. Lucie Nuclear Power Plant, directly resulting in unauthorized take of critically endangered smalltooth sawfish and sea turtles by FLP. By authorizing this harmful activity to continue, NRC is in violation of Section 9 of the ESA.<sup>28</sup> By causing unauthorized takes, FPL is also in violation of Section 9 of the ESA.

The Fisheries Service's 2016 BiOp authorizes the non-lethal capture of one smalltooth sawfish every five years from the date of the opinion, March 24, 2016, through March 1, 2036.<sup>29</sup> Since the issuance of the BiOp three years ago, however, FPL has already captured at least two smalltooth sawfish in the St. Lucie intake canal.

The Fisheries Service's 2016 BiOp authorizes the capture of eight Kemp's ridley sea turtles annually.<sup>30</sup> However, in January 2018 alone, FPL captured nine Kemp's ridley sea turtle individuals in the St. Lucie intake canal. So far in 2019, FPL has captured ten Kemp's ridley individuals in the St. Lucie intake canal with the ninth captured on April 14th and the tenth captured on April 15th. The capture of ten Kemp's ridley turtles so far in 2019 represents the second consecutive year with elevated numbers of live and healthy Kemp's ridley sea turtles observed in the St. Lucie intake canal.

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<sup>28</sup> See Strahan v. Coxe, 127 F.3d 155, 164 (holding that a "governmental third party[,] pursuant to whose authority an actor directly exacts a taking of endangered species[,] may be deemed to have violated the ESA."); Animal Protection Inst. v. Holsten, 541 F.Supp.2d 1073, 1080 (holding that a state licensing scheme can be a proximate cause of a taking in violation of the ESA); Sierra Club & S.C. Wildlife Fed'n v. Kolnitz, No. 2:16-cv-03815-DCN, 2017 U.S. Dist. LEXIS 128462, 16 (D.S.C. Aug. 14, 2017) ("A government official violates the ESA's "take" prohibition when that official authorizes someone to exact a taking of an endangered species, which, but for the authorization, could not have taken place").

<sup>29</sup> BiOp at 60.

<sup>30</sup> Id. at 56.

The Fisheries Service's 2016 BiOp authorized the capture of 500 green turtles annually, of which up to 5 may be killed by plant operations annually until March 1, 2036.<sup>31</sup> However, by May of 2018, FPL had already lethally captured 6 green sea turtles.

The Fisheries Service has acknowledged that FPL has exceeded take limits authorized in the BiOp for two species of sea turtles and the smalltooth sawfish. These exceedances constitute unlawful take in violation of Section 9 of the ESA.

In addition, NRC and FPL are violating other terms and conditions of the 2016 BiOp. Under the BiOp, NRC is required to ensure that FPL designs, tests, constructs, and implements excluder devices for the intake pipe velocity caps at SLNPP.<sup>32</sup> FPL must consult with the Fisheries Service and the NRC on the designs and test results. Specifically, within 60 days of receipt of all excluder device design and test information and clarifying discussions, the Fisheries Service must agree to the design for the structure before installation at the velocity caps.<sup>33</sup> The designs and test information and clarifying discussions were released on December 6, 2018 and sent to NRC by letter dated December 28, 2018 – more than 150 days ago. Yet, NRC withdrew from consultation on December 18, 2018, more than five months ago, and has not taken any action to comply with or ensure compliance with the terms of the BiOp. Based on NRC's and FPL's failure to timely comply with this requirement, the BiOp's protective coverage for the operation of the St. Lucie facility has lapsed and both NRC and FPL are now operating in violation of the ESA.<sup>34</sup>

### **III. Violations of ESA Section 7**

The Fisheries Service's and NRC's continued authorization of the St. Lucie facility's operation during and without completing consultation violates Sections 7(a)(1), 7(a)(2), 7(b), and 7(d) of the ESA. Consistent with the applicable regulations, reinitiation of consultation is required under the 2016 BiOp "where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded."<sup>35</sup> Because take limits have been exceeded, the agencies must reinstitute and complete consultation. Allowing FPL to continue operating without new consultation or corrective action violates the ESA and its implementing regulations, as well the BiOp itself.

The facts are not in dispute here. FPL is currently operating under a BiOp that the Fisheries Service has admitted is inadequate (and arguably has now lapsed), and

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<sup>31</sup> Id. at 55.

<sup>32</sup> Id. at 66.

<sup>33</sup> Id.

<sup>34</sup> Id. at 65.

<sup>35</sup> Id. at 70.

FPL has reported exceedances of its BiOp take limits. NRC is, therefore, violating Section 7 by failing to reinitiate consultation and/or by reinitiating but then prematurely terminating consultation without new incidental take authorization. The Fisheries Service, likewise, is violating Section 7 by failing to ensure that the ongoing operation of the SLNPP will not jeopardize the continued existence of smalltooth sawfish, Kemp's ridley sea turtles, and green sea turtles. In order to remedy these violations, the agencies must reinitiate consultation on the effects of the SNLPP's ongoing operation on these protected species in light of changed circumstances and new information presented by the incidental take exceedances.

## **CONCLUSION**

For the reasons stated above, pursuant to the citizen suit provisions of the ESA, Turtle Island Restoration Network and Beyond Nuclear intend to pursue their legal remedies unless these legal violations are corrected. As advocacy organizations focused on sea turtle protection, our clients believe that the situation is dire and demands urgent action. The Fisheries Service, NRC, and FPL can forestall litigation over this matter by timely reinitiating *and completing* consultation regarding the effects of the SNLPP facility on smalltooth sawfish, Kemp's ridley sea turtles, and green sea turtles. This notice letter is prepared based on good faith information and belief. If you believe that anything set forth here is erroneous or inaccurate, we welcome the opportunity to discuss it with you further. Please do not hesitate to contact our clients or our office by electronic mail at dsivas@stanford.edu.

Sincerely yours,



Joseph Zabel, Certified Law Student